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Supreme Court of the United States

OCTOBER TERM, 1952

INTERSTATE COMMERCE COMMISSION,
THE PENNSYLVANIA RAILROAD COMPANY,
THE VIRGINIAN RAILWAY COMPANY,
SOUTHERN RAILWAY COMPANY,
ATLANTIC COAST LINE RAILWAY COMPANY,
SEABOARD AIR LINE RAILROAD COMPANY, and
NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 18, 1952 (R. 801), with one judge dissenting, reversing a judgment of the United States District Court for the District of Columbia and directing that court to set aside an order of the Interstate Commerce Commission issued on July 25, 1947.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 770-800) is not yet reported. The opinion of the District Court for the District of Columbia (R. 83-91) is reported in 92 F. Supp. 998.

JURISDICTION

The judgment of the Court of Appeals was entered July 18, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

This is the first case in which this Court has been called upon to review an order of the Interstate Commerce Commission denying reparation. The question presented is whether the Court of Appeals departed from the standards established by this Court for the review of administrative orders by substituting its judgment on the facts for that of the Commission in the following respects:

1. By rejecting the finding of the Interstate Commerce Commission that under the applicable tariffs the railroads were not obligated to make an allowance (refund) to the United States for terminal services performed subsequent to delivery of freight shipments.

2. By rejecting the Commission's finding that it was impracticable, and hence not required, for the railroads to provide the services in question under the conditions prescribed by the United States as shipper.

3. By disregarding the finding of the Commission as to the point in time and space at which the carriers' transportation service ended.

4. By holding that certain factual differences in circumstances and conditions, as found by the Commission, did not justify differences in railroad rates and services under Section 2 of the Interstate Commerce Act.

5. By concluding, in disregard of the Commission's finding and the evidence, that terminal services were "paid for by the shipper as part of the line-haul rate."

6. In rejecting the finding of the Commission that the failure of the carriers to provide the terminal services in question did not make the line-haul rates unreasonable.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

On April 15, 1944, the United States filed a complaint with the Interstate Commerce Commission charging that the refusal of certain railroads to pay allowances to the United States for wharfage and handling[1] of freight moving to Army Base piers in Norfolk, Virginia, violated the Interstate Commerce Act. The complaint specifically alleged that the refusal to pay the allowances resulted in rates that were unjust and unreasonable in violation of Section 1(5)(a) and Section 1(6) of the Act, unjustly discriminatory in violation of Section 2 and in violation of Section 6(8) and Section 15(13) (R. 100). After hearing, an Examiner recommended dismissal of

[1] The term "wharfage" means providing space on a pier where freight may be placed, and "handling" means loading or unloading freight to or from cars.

the complaint (R. 617). Division 2 of the Commission (with one Commissioner dissenting) reversed the Trial Examiner, *United States* v. *Aberdeen & R. R. Co.*, 263 I.C.C. 303 (1945). On reconsideration the full Commission, with four members dissenting, reversed Division 2 and dismissed the complaint, *United States* v. *Aberdeen & R. R. Co.*, 264 I.C.C. 683 (1946). This decision was affirmed on reargument. *United States* v. *Aberdeen & R. R. Co.*, 269 I.C.C. 141 (1947).

The United States thereupon brought suit in the United States District Court for the District of Columbia against the United States and the Interstate Commerce Commission to enjoin, annul and set aside the Commission's order (R. 1). The petitioning railroads intervened (R. 62). A three-judge court convened under the provisions of the Urgent Deficiencies Act dismissed the suit on the ground that the United States could not maintain a suit against itself. *United States* v. *Interstate Commerce Commission*, 78 F. Supp. 580 (D.C. D.C. 1948). On appeal this Court reversed, holding that the United States was entitled to judicial review, and that on remand the case should be heard by a one-judge district court. *United States* v. *I. C. C.*, 337 U. S. 426, 440-444.

Upon remand the case was heard by the United States District Court for the District of Columbia which held that the Commission's order was "founded upon ample evidence, and is in accordance with law" and dismissed the complaint (R. 83-91).

The United States appealed to the United States Court of Appeals for the District of Columbia Circuit. That court, with one judge dissenting, held that the Commission's findings were not supported by substantial evidence, that certain of its legal conclusions were

in conflict with the standards established by Congress to determine when reparations are due, and that the case should be remanded to the Interstate Commerce Commission for further proceedings consistent with the court's opinion (R. 770-800). On July 18, 1952, the Court of Appeals entered a judgment reversing the judgment of the District Court and directing that the order of the Interstate Commerce Commission be set aside.

The question presented to the Commission was whether after June 15, 1942, when the United States took over certain pier and warehouse facilities in Norfolk, Virginia, known as the Army Base, which had theretofore been operated as a public terminal for rail-ocean freight, the United States was entitled to the same compensation previously paid by the railroads to the terminal operator, as their agent, for wharfage and handling services in connection with rail freight. By their tariffs the railroads reaching Norfolk (but not other connecting line-haul carriers) undertook to provide wharfage and handling services on certain export freight moving over public piers, e.g., the piers of Transport Trading & Terminal Corporation, and they carried out their undertaking by employing the terminal operator to provide the services. The compensation paid to the terminal operator was described in the tariffs as allowances, although such payments are not correctly termed allowances and are not required to be published in tariffs.[2] In substance the tariff merely meant that the carriers would provide

[2] In Handling Freight Between Ships and Cars at Ports, 253 I.C.C. 371 (1942), the Commission noted that this type of payment is not a true allowance which requires tariff publication under 15(13).

the services at the public piers in question without cost to shippers.

After the United States terminated the lease of Transport Trading & Terminal Corporation it announced that: "The terminal properties will be operated and controlled by the War Department. * * * It is intended to use the terminal facilities for Government traffic only. However circumstances may require the handling of commercial freight and in either instance the War Department or its agency will perform all services" (R. 336). "Army Base Piers No. 1 and 2 are the property of the Government and are operated by the War Department for its own exclusive use" (R. 338-340).

The Army requested the carriers to change their tariffs so as to provide for the payment of allowances to the Army for providing its own wharfage and handling services with respect to its own freight (R. 331, 336, 337-340). This the carriers declined to do on the ground that it was not the practice to pay allowances to shippers who provided their own piers and handled their own freight (R. 341-342). After more than ten months of negotiations for allowances the Army broadened its request to a demand for actual performance by the carriers of the unloading services, although not for wharfage for obvious reasons, but it made this demand as a "prerequisite" to the complaint to the Commission (R. 342-343). Presumably the demand was made in this form in deference to the well established principle that a carrier has the right to perform any duty owed and cannot be required to employ a shipper to perform a part of the transportation service in his own behalf. *Atchison Railway Co.* v. *United States*, 232 U. S. 199. The railroads declined to perform the services on the ground that it was not the practice to accord terminal

services on private facilities but that their tariffs dealt only with public piers (R. 345-352). When the formal complaint was filed with the Commission it sought only the payment of allowances or a corresponding reduction in the line-haul rates, not the performance of services (R. 100).

The Commission found that in the absence of a tariff obligation it was not the legal duty of the carriers either to provide piers or to load or unload carload freight (R. 42). The Commission further found that the tariffs did not obligate the carriers to pay allowances for the services in question and that it was not the practice of the carriers to pay allowances for such services, the practice being limited to actual performance by the railroad (R. 26, 31, 43). The Commission held that it was within the right of the carriers to refuse to hire the Army to provide piers or to handle its own freight (R. 32). The Commission further found that it was the practice of the carriers to accord the terminal services only on public piers, not on piers controlled by a shipper; that the Norfolk terminal tariffs were not subject to a different construction, and that the distinction between public and private piers justified differences in treatment under Section 2 of the Act (R. 31, 45). The Commission found that the Army Base should be treated as a private terminal of the Army, as distinguished from a terminal open to all shippers on equal terms, once the United States took over the facility and terminated the agency relationship between the railroads and the terminal operator (R. 31, 33, 45). As to the charges paid on Army freight the Commission found that the export rates were not unreasonable in the absence of the terminal services and that the United States was actually accorded more favorable rates, below the level of maximum reasonable-

ness, than any other shipper would have been entitled to in similar circumstances (R. 30-31, 46-49).

Wholly apart from the foregoing findings, all of which are within the peculiar competence of the administrative tribunal, the Commission found on the facts that the United States had cut off any obligation that the carriers might otherwise have had to perform the terminal services or pay allowances in lieu thereof. It held that the election by the Army to handle its own freight and the methods prescribed by it for the operation of the piers made impracticable the performance of services by the carriers, thus relieving them of any such obligation (R. 27-32, 45).

Likewise the Commission found, quite apart from any question of the practicability of performance, that the Army required and accepted delivery of its freight on designated storage tracks back of the piers and that such delivery terminated the transportation obligation under the line-haul rates regardless of what the obligation might have been if the Army had desired or permitted additional service (R. 27, 32, 44-45). In the language of this Court the Commission fixed "the point in time and space at which the carriers' transportation service ends." *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 194.

Upon review the District Court concluded that the action of the Commission was "founded upon ample evidence and is in accordance with law." 92 F. Supp. 998, 1002. The court further observed (92 F. Supp. at p. 1002):

> "It is simply unthinkable that, if the payment and allowance here sought by the Government had been sought by a private party, it would receive any favorable consideration. It is of incomparable importance that, where the action of an adminis-

trative organ of the Government makes its decision after fair hearing upon evidence ample to support it, and in accordance with principles long recognized to be applicable, such decision should not be disturbed by a court because it happens not to give financial advantage to the Government as a shipper of freight."

The Court of Appeals, Judge Wilbur K. Miller dissenting, disagreed with the District Court and the Commission. The majority of the Court of Appeals rejected the Commission's finding on the construction of the tariff stating that a prospective shipper reading the tariff provision "would assume that wharfage and handling charges would be absorbed at the pier facilities" (R. 781), that all ambiguities or reasonable doubts as to the meaning of the tariff should be resolved against the carriers, that this settled rule was not considered by the Commission, or at least not discussed in its reports (R. 781-782), and that the evidence was insufficient to support the Commission's findings with respect to the construction of the tariff. The majority of the court below also rejected the Commission's finding that the special tariff provision making the export rates applicable to the movement of traffic handled over the piers did not require the carriers to make the payments in question to the Government (R. 782-784). The majority of the Court of Appeals disagreed with the Commission's finding that the Army by its own methods had precluded the performance of the service and disregarded the Commission's finding that the carriers' transportation obligation was fully performed when the cars were placed on the storage track in accordance with the Government's instructions (R. 785-788). The majority of the court below

also was unwilling to accept the Commission's distinction between public and private terminals as an adequate ground for differences in treatment, contrary to the Commission's finding on the facts and in disregard of the Commission's adherence to this principle in a long line of cases[3] (R. 793-795). The majority of the court below differed explicitly or by implication with the findings of the Commission on every important rate-making principle discussed and applied by the Commission in its reports. In these several respects petitioners believe that the conclusions of the majority of the court below are based upon its own weighing of the evidence and constitute a substitution of the court's judgment for that of the Commission as will be shown more fully at pp. 15-29, *infra*.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. By substituting its judgment on the facts for that of the Interstate Commerce Commission on transportation questions which have been committed by Congress to the primary jurisdiction of the administrative agency.

2. By holding that the Commission's findings lack substantial supporting evidence and that its legal conclusions are opposed to the standards established by Congress to determine when reparations are due.

3. By rejecting the finding of the Interstate Commerce Commission that under the applicable tariffs the railroads were not obligated to make an allowance (re-

[3] The majority of the court below also took the position that the record did not support the Commission's findings that the Army Base piers were *private* "as that term is normally used in this field." (R. 794)

fund) to the United States for terminal services performed subsequent to delivery of freight shipments.

4. By rejecting the Commission's finding that the lower export rates applied to Government shipments only by virtue of a special tariff provision which did not provide either for wharfage and handling or for the payment of allowances therefor.

5. By rejecting the Commission's finding that it was impracticable, and hence not required, for the railroads to provide the services in question under the conditions prescribed by the United States as shipper.

6. By holding that even if the Government by its action in taking over the piers had made performance by the carriers impracticable the carriers were nevertheless obligated to pay the Government an allowance for wharfage and handling.

7. By disregarding the finding of the Commission as to the point in time and space at which the carriers' transportation service ended.

8. By holding that certain factual differences in circumstances and conditions, as found by the Commission, did not justify differences in railroad rates and services under Section 2 of the Interstate Commerce Act.

9. By concluding, in disregard of the Commission's finding and the evidence, that terminal services were "paid for by the shipper as part of the line-haul rate."

10. In rejecting the finding of the Commission that the failure of the carriers to provide the terminal services in question did not make the line-haul rates unreasonable.

11. In setting aside the order of the Interstate Commerce Commission.

REASONS FOR GRANTING THE WRIT

This is the first case in which this Court has been called upon to review an order of the Interstate Commerce Commission denying reparation. See *United States* v. *I.C.C.*, 337 U.S. 426.[4] In accordance with the rule first laid down by this Court in this case, *United States* v. *I.C.C.*, 337 U.S. 426, the order of the Commission has been directly reviewed by a district court and a circuit court of appeals rather than by a three-judge court convened under the Urgent Deficiencies Act.

More is involved in this case than merely the question of the obligation of the carriers to pay money to the Government. The basic question raised by the opinion below is whether the Court of Appeals correctly applied the standards established by this Court for review of orders of the Interstate Commerce Commission. Although the court below correctly stated the applicable standards in abstract and general terms (R. 777), the petitioners submit that in its decision the court disregarded and departed from those standards. If petitioners are correct in this contention then the decision below in reality establishes standards of review for reparation orders that are different from and in conflict with the standards that this Court for many years has applied to other orders of the Commission in cases arising under the Urgent Deficiencies Act. No justification for such a double standard of review can be found either in the provisions of the Interstate Commerce Act or the decisions of this Court. Cer-

[4] See particularly the dissenting opinion of Mr. Justice Frankfurter, 337 U. S. 426, 444-471. See also the opinion below, footnote 2, (R. 776).

tainly if there is to be, as a practical matter, one standard for review of reparation orders of the Commission and a different standard for review of orders under the Urgent Deficiencies Act that result should be reached only after consideration of the question by this Court.

The decision of the court below has general consequences that go beyond the decision of the particular case. In a number of important respects the opinion affects railroad practices generally. The holdings of the court below on the propriety and legality of terminal practices and on the question of discrimination are inconsistent with principles that the Commission has developed and consistently applied over the years in dealing with these technical and complex transportation questions. These holdings in effect require the Commission to abandon or to reverse a long line of its own decisions.[5]

Although the court below directed that the case be remanded to the Commission for "such further proceedings as may be appropriate, consistent with this opinion" (R. 799), the question presented by the opinion below may now appropriately be reviewed by this Court. The judgment below set aside the order of the Commission and is therefore more than merely

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[5] Norfolk Port Commission v. Chesapeake & O. Ry. Co., 159 I.C.C. 169 (1929); City of Newark v. Pennsylvania R. Co., 182 I.C.C. 51 (1932); M'Cormick Warehouse Co. v. Pennsylvania R. Co., 191 I.C.C. 727 (1933); Newark, N. J. Cham. of Com. v. Pennsylvania R. Co., 206 I.C.C. 555 (1935); Weyerhaeuser Timber Co. v. Pennsylvania R. Co., 229 I.C.C. 463 (1938); Interchange of Freight at Boston Piers, 253 I.C.C. 703 (1942); Patterson v. Aberdeen & R. R. Co., 266 I.C.C. 45 (1946); Borough of Edgewater v. Arcade & A. R. Corp., 280 I.C.C. 121, 125 (1951); Rukert Term. Corp. v. Baltimore & O. R. Co., 283 I.C.C. 5 (1951).

interlocutory in character. Even though petitioners are not now obligated to seek judicial review, the posture of the case permits them to do so.[6] Furthermore, by its discussion of the evidence, in which the court below weighed the evidence and substituted its judgment on the facts for that of the Commission, and by its discussion of certain general legal principles said by the court below to be applicable to the issues, the Court of Appeals, in effect, plainly indicated to the Commission the result that the court below believed the Commission should reach in any proceedings that follow remand. The opinion below may, therefore, properly be regarded as intended to limit or control any subsequent exercise by the Interstate Commerce Commission of its statutory jurisdiction in this case.

As background for consideration of the specific issues decided by the court below it is important to note that the United States did not pay wharfage and handling charges, either directly or indirectly. The Commission found on the evidence (R. 240-243) that the line-haul rates did not *per se* include the terminal services and that they contained no element of compensation for the services; in other words nothing was added to the rates to cover the services so that the rates do not automatically become unreasonable when the service is not granted. Similar conclusions have necessarily been reached in every other case in which the Commission has declined to extend the terminal services to privately operated facilities.[7]

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[6] Cf. United States v. U. S. Smelting Co., 339 U.S. 186, 199: "The appellants might have appealed, but they were not bound to."

[7] See the cases cited in footnote 5, p. 13, *supra*.

The Commission found not only that the export rates were below a maximum reasonable level, but that except for a concession on the part of the carriers the Army would not have been entitled to the export rates and that the traffic of other shippers under similar circumstances would have been subject to the higher domestic rates. In plain language either the granting of the export rates to private shippers or the payment of allowances would be an unlawful rebate and the Commission so held in *M'Cormick Warehouse Co.* v. *Pennsylvania R. Co.*, 191 I.C.C. 727 (1933). This Court affirmed a similar finding in a related case in *Warehouse Co.* v. *United States*, 283 U.S. 501. What the United States seeks is not equality of treatment with other shippers, but a preference: it seeks to retain the advantages that flow from control of its own freight on its own piers and at the same time the advantages incident to the use of public piers. The Commission has heretofore declined to permit, let alone require, the carriers to accord both sets of advantage to other shippers.

1. The Survival of the Tariff Obligation

The Court of Appeals rejected the finding of the Commission that under the tariff the carriers were not obliged to pay allowances to the Army for wharfage and handling. In considering this question the court seems to have assumed that the record before the Commission disclosed a violation of Section 6(7), although it is to be noted that in the complaint filed with the Commission the Government raised no issue under this Section of the Act.[8] In dealing with the tariff question

[8] This fact is significant because of its bearing on the Army's interpretation of the tariff; the petitioners make no point as to the technical sufficiency of the Government's pleading before the Commission.

the Court of Appeals relied primarily on the following tariff provision (R. 780):[9]

> "At Lincoln Tidewater Terminals, Inc., Transport Trading and Terminal Corporation, or Southgate Terminal Corporation (Portsmouth Division Terminal).
>
> "Wharfage, handling and terminal charges, as published in Norfolk and Portsmouth Belt Line Railroad Tariff No. 6-J, I.C.C. No. 105 will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in connection with the Virginian Railway through the above terminals."

The Commission reading this tariff, as it should be read, in connection with the tariff of the Belt Line Railroad, found that it merely provided for the inclusion in the transportation rates of certain payments made by the carriers to a particular terminal operator selected by them to act as their agent. The court below rejected this construction, saying (R. 781):

> "A prospective shipper, reading the tariff provision, would assume that wharfage and handling charges would be absorbed at the pier facilities through which his export freight would move, regardless of any change in the identity of the operator."

This statement by the court amounts to a virtual construction of the tariff as a matter of law, particu-

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[9] The particular provision quoted by the court appears in the tariff of The Virginian Railway Company (R. 441-442). The tariffs of other carriers contained similar provisions.

larly when read with the court's assertion that one of the applicable legal principles is that the tariff should be read as conveying "that meaning which the words used might reasonably carry to the shippers to whom they are addressed" (R. 781).

In fact there is no evidence in the record to support the court's construction of the tariff. There was no evidence that any shipper had ever adopted or relied upon the construction of the tariff suggested by the court. On the contrary there was substantial evidence that the Army had itself adopted a different construction of the tariff. See pp. 18-19, *infra.*

Having thus suggested that the tariff, properly construed, required the carriers *to provide services* for the Army after the Army had taken over the piers the court below then makes the further suggestion, again expressed in terms that amount virtually to a legal conclusion, that the tariff was a promise by the carriers *to pay allowances* to the Army on traffic moving over the Army Base. On its face the tariff says nothing that could require the payment of allowances to the Army or anyone else. It merely states that charges of the Belt Line Railroad, as published in its tariff, will be included in the line-haul rates, i.e., that they will be absorbed by the Virginian Railway. Since the Belt Line Railroad assessed no such charges, its agent having been evicted from the piers by the Army, and the Army paid none, the tariff had no *prima facie* application. Reference to the specified provision of the tariff of the Belt Line Railroad, which is not mentioned in the opinion of the court below, discloses the true meaning of the tariff provision (R. 444):

> "For the use of wharves, warehouses, slips, channels, tracks and approaches and other

> facilities at * * * Transport Trading & Terminal Corporation, Norfolk, Virginia, and for other services rendered by * * * Transport Trading & Terminal Corporation, as Agent for Norfolk and Portsmouth Belt Line Railroad Company, the Norfolk and Portsmouth Belt Line Railroad makes an allowance, equal in the amount of charges provided in this tariff, or as amended, to * * * Transport Trading & Terminal Corporation * * *."

The court below regarded the tariff provisions as ambiguous; it referred to the general rule that "all ambiguities or reasonable doubts" as to the meaning of the tariff should be resolved against the carrier and stated that this settled rule was "apparently not considered by the Commission or at least not discussed in its reports" (R. 781-782).

It seems clear that the Commission did not regard this canon of construction as relevant because it did not believe that the tariffs were ambiguous. In this view the Commission was fully supported by uncontradicted evidence with respect to the views and behavior of the Army itself. The facts indicate that the Army had no doubt about the meaning of the tariff. From the time the Army took over the facility on June 15, 1942, through negotiations lasting almost a year, it requested only that the tariffs be changed, so as to provide for payments to the United States, recognizing that the existing tariffs did not so provide (R. 331-340). The complaint filed April 15, 1944, was based on the same recognition and it did not allege a tariff violation or mention Section 6(7) (R. 100). At the hearing on July 18, 1944, the Army's tariff witness admitted that the tariff did not run in favor of the Army but

meant only that the Transport Trading & Terminal Corporation would still be entitled to allowances "if that company were operating the pier." (R. 159-160) The Commission so construed the tariffs and indeed a contrary conclusion would be in the teeth of all prior rulings in similar cases as the court's conclusion would run in favor of any other operator of the pier as well as the Army, e.g., any of the shippers who have been denied similar privileges in other cases.

2. The Application of the Export Rates.

The construction placed on the tariff by the court below, i.e., that it provided for absorption of wharfage and handling charges "regardless of the identity of the operator" of the piers, raised a dilemma requiring the court to overrule the Commission on its findings with respect to the application of export rates. The terminal had to possess the status of an Army Base, as distinguished from a public pier, in order to secure the benefit of export rates on Army shipments. Under the methods followed by the Army in handling its freight at the Base, the normal export rates would not have been applicable, and the Commission found that in similar circumstances no other shipper would have been entitled to export rates (R. 31, 46). Thus, since under this finding the terminal necessarily had to have the status of an Army Base for rate purposes, the court ran into difficulty in ascribing a broader character to the terminal, i.e., not private in the normal sense, and in construing the tariff as holding out the services to any shipper, "regardless of the identity of the operator." The court solved this problem by holding that the special tariff provision according export rates to Army and Navy bases was unnecessary, "not a con-

cession at all," as found by the Commission, but "simply a recognition" of the fact that export rates should apply. The court said it would be *prima facie* unreasonable not to apply the export rates (R. 784).

The export tariffs are explicit in stating that they apply only "on traffic which does not leave the possession of the inland carrier until delivered to the ocean carrier or its agent" (R. 43, 367). Since the Army took possession of its own freight on the Army Base, having actually occupied the Base for that purpose, it was not entitled to export rates under customary tariffs. The United States fully recognized this rule when it requested the railroads at the beginning of World War II to make the export rates applicable over Army and Navy bases and this request was granted by Eastern and Southern carriers (although not by Western carriers) in 1941 for the first time in history. In 1915 the Commission had ruled in *United States* v. *Pennsylvania R. Co.*, 32 I.C.C. 730 (1915), that export rates were not so applicable, because of the custody rule, and this ruling was never thereafter questioned. In fact during World War I, under Government control, when the Government was the principal exporter, it cancelled all export rates.[10] Con-

[10] In contrast with this Governmental action the Court of Appeals suggested that in time of war the strict rules might well be relaxed in favor of the Government, obviously not a matter for legal determination by the courts. The cases cited in note 9 to the court's opinion do not support the proposition stated by the court. Gulf Carloading Co., Inc. v. Baltmore & O. R. Co., 266 I.C.C. 283 (1946), upheld the custody rule and denied export rates on shipments not directly interchanged between rail and vessel. Products-from-Sweden, Inc. v. Lehigh Valley R. Co., 263 I.C.C. 760 (1945), did not involve the custody rule, but held domestic rates unreasonable on shipments frustrated at the port after com-

trary to the informed judgment of the Commission, which found that granting the export rates on the shipments involved in this case was a concession, the Court of Appeals suggested that it would be *prima facie* unreasonable to withhold export rates by reason of the Army's dominion over its own freight. It reached this conclusion not by way of tariff construction but on the basis of what it regarded as the purpose of the export tariff rates and the reasonableness of their application.

In support of its opinion the court said that the custody rule is only a policing regulation which can readily be met by furnishing proof of exportation. In this the court erred as there is no such general exception to the rule. The tariffs contain a minor exception which permits shippers to take delivery of their freight at railroad stations and move it themselves direct to steamship piers provided proof of exportation is given (R. 367-368). This rule was available to the Army at Norfolk, but obviously was not used as the Army desired delivery of its freight to the Army Base by the railroads. When the rule is used there is no need for the carriers to provide wharfage or handling service as the shipper handles his own freight between railroad stations and steamship piers in addition to relieving the railroads of switching service. The Commission has consistently applied the custody rule in cases dealin with terminal services. *M'Cormick Warehouse Co.* v. *Pennsylvania R. Co.*, 191 I.C.C. 727, 729 (1933); *Rukert Term. Corp.* v. *Baltimore & O. R. Co.*, 283 I.C.C. 5, 15 (1951).

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pliance with the export tariff rules, but subsequently exported through another port. Cf. Hanlon-Buchanan, Inc. v. Burlington-Rock Island R. Co., 263 I.C.C. 603 (1945).

The very fact that export rates were specially published to apply to Army and Navy bases precludes any notion that the carriers would furnish the piers, i.e., wharfage. Nor did the Army request wharfage services when it deemed it necessary, as a prerequisite to a formal complaint to the Commission, to request the actual performance of handling services (R. 331-340). The court below nevertheless concluded that the line-haul rates included both wharfage and handling services without distinction.

3. The Scope of the Tariff Obligation—Practicality

The court below held that the Commission erred in concluding that even if the carriers had a tariff obligation to perform services (not to pay allowances), they were relieved of the obligation when the Army elected to perform the services in its own behalf. On evidence presented solely through Army witnesses, the Commission found that it was impractical for the railroads to provide wharfage and handling services when the Army took possession. The court below suggests that this finding is erroneous not as a matter of law but because it differs with the Commission on the factual issue of what was practicable under reasonable standards. The question whether it was *practicable* for the carriers to continue to perform the services is peculiarly the kind of question which falls within the special competence of the Commission. Its finding on this question was supported by substantial evidence in the record as a whole and should not have been disturbed (R. 114-121, 131-133).

The court below further concluded that even if performance was not practicable, that fact did not release

the carriers from an obligation to pay allowances. In reaching this conclusion the court brushed aside the rule established by the Commission in Ex Parte 104, *Propriety of Operating Practices—Terminal Services,* 209 I.C.C. 11 (1935), which the Commission found, on the facts, to be applicable, in the instant case.[11] A statement of the rule in the words of the Commission follows (209 I.C.C. 11, 29):

> "When a carrier is prevented from performing the service by the election of the industry to perform it, and when the service of the carrier would not meet the needs and convenience of or be satisfactory to the industry, the carrier's duty to perform the service under the line-haul rate is discharged, and there is no obligation resting upon it to make an allowance to the industry for performing the service."

The words "the carrier's duty to perform the service under the line-haul rate is discharged" show that

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[11] In discussing the question of practicability the court below commented that "almost from the start the railroads manifested an unwillingness to continue performance." This conclusion, even if admitted to be correct, is irrelevant. The application of the rule laid down in Ex Parte 104 does not depend upon the willingness of the carriers to continue to perform service. Compare United States v. U. S. Smelting Co., 339 U.S. 186, 197. In any event, even though it may be admitted that the railroads were unwilling to perform the services because contrary to established practice, the fact is that in the first instance the Army did not request or desire performance. As noted above, the Army categorically announced that it would perform its own services and requested only allowances, except for the alternative demand as a prerequisite to formal complaint, but even when the latter was filed, service was not requested. However, the Commission's finding is based upon the evidence rather than upon these formalities.

this rule applies even though the carrier is under a tariff obligation to render service. Thus, even if the Government's construction of the tariff is accepted, this rule is in itself dispositive of the Government's claim in this case. The enunciation of this rule is an exercise by the Commission of its statutory authority to determine the amount of transportation service covered by the rates. This Court has consistently held that the application of the principles laid down in *Ex Parte 104,* to particular facts is a question for the Commission and not the courts. See *United States* v. *Am. Tin Plate Co.,* 301 U.S. 402; *United States* v. *Pan American Corp.,* 304 U.S. 156; *I. C. C.* v. *Hoboken R. Co.,* 320 U.S. 368; *United States* v. *Wabash R. Co.,* 321 U.S. 403; *United States* v. *U. S. Smelting Co.,* 339 U.S. 186.

4. Termination of the Carriers' Transportation Obligation

The evidence before the Commission showed that the Army directed the carriers to deliver freight consigned to the Army Base at designated yard tracks far removed from the piers, that the carriers complied with these instructions, and that the Army thereupon took charge of the cars and performed its own switching to piers and warehouses (R. 230-232, 296). Upon this evidence the Commission concluded that in the circumstances the carriers discharged their full transportation obligation when they placed the cars in the storage yard. The Court of Appeals gave no effect to this finding.

This Court has consistently held that it is the Commission's prerogative to fix as a fact the point of termination of railroad service. *United States* v. *Am. Tin*

Plate Co., 301 U.S. 402; *United States* v. *Pan American Corp.*, 304 U.S. 156; *United States* v. *Wabash R. Co.*, 321 U.S. 403; *United States* v. *U. S. Smelting Co.*, 339 U.S. 186. All of these cases involve the determination of the amount of service required or permitted under the line-haul rates, the identical question discussed by the Court of Appeals. The issue in the cases, as in this case, was whether the shipper paid for more service than he received. In the *U. S. Smelting Co.* case, at p. 194, the Court pointed out that the issue involved a claim that payment for terminal services "in addition to the line-haul rates, in accordance with the Commission's orders, would be to require the smelters to pay twice for the services." The Court held again, as it had held in every terminal switching case coming before it, that it is the prerogative and duty of the Commission to fix "the point in time and space at which the carriers' transportation service ends," as a question of fact and that its findings on that question will not be disturbed by the courts if supported by evidence.

The Commission's finding, which was fully supported by the evidence, that the carriers discharged their full transportation obligation, when, in accordance with the Army's instructions, they placed the cars on designated yard tracks, completely disposes of this case. "The fact that the tariff filed permitted the allowance for a long period of time has no bearing." *Hanna Furnace Corporation* v. *United States*, 53 F. Supp. 341, 345 (D.C. W.D. N.Y. 1943); affirmed 323 U.S. 667. And see *Warehouse Co.* v. *United States*, 283 U.S. 501, 504, 507, 511. The fact that further service might have been feasible is similarly irrelevant.

5. The Issue of Discrimination

With respect to the issue of undue discrimination under Section 2, the Commission held that "if anything, the complainant is being favored" and that the freight of other shippers "is not the like kind of traffic contemplated by Section 2 of the Act dealing with discrimination, and if handled in the same manner as the complainant's freight, the export rates would not apply, much less the accessorial service demanded by the complainant or an allowance therefor." (R. 31, 46) The distinction which the Commission found justified the difference in treatment was the difference between freight handled through private facilities where the owner has dominion over his own shipments and freight handled through public facilities where the shipper cannot interfere. This basis for differentiation in rates and services has long been the ground for Commission decision in this type of case.[12] See, for example, *M'Cormick Warehouse Co.* v. *Pennsylvania R. Co.*, 191 I.C.C. 727, 729 (1933), where the Commission held

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[12] City of Newark v. Pennsylvania R. Co., 182 I.C.C. 51 (1932); Newark, N.J., Cham. of Com. v. Pennsylvania R. Co., 206 I.C.C. 555 (1935); Interchange of Freight at Boston Piers, 253 I.C.C. 703 (1942); Patterson v. Aberdeen & R. R. Co., 266 I.C.C. 45 (1946). In a recent case, Borough of Edgewater, N.J. v. Arcade & A. R. Co., 280 I.C.C. 121, 125-126 (1951), the full Commission, without dissent, stated:

> "A distinction, however, in the application of the rates to industrial piers which the railroads do make is that, while at railroad or other public piers they unload or load the cars, or absorb the cost thereof, in no event do they perform such service, or absorb its cost, on traffic of industrial pier owners, delivered, or received, at such piers. *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I.C.C. 463, 472-473. It will be understood that, in their application to industrial piers, our findings observe and embody such distinction."

that discrimination would be created if the distinction were not observed.

The *McCormick Warehouse* case was the sequel of an earlier proceeding, 148 I.C.C. 299, which held that it was a violation of Section 2 for the railroads to pay allowances to certain warehouses. The Commission's order was affirmed in *Terminal Warehouse Co.* v. *United States,* 31 F. 2d 951 (D. C. D. Md. 1929), and a companion case was affirmed in this Court, *Warehouse Co.* v. *United States,* 283 U. S. 501. The *McCormick Warehouse* case was followed in the most recent Commission report dealing with similar subject matter. *Rukert Term. Corp.* v. *Baltimore & O. R. Co.,* 283 I.C.C. 5, 15 (1951).

The Court of Appeals said that *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.,* 229 I.C.C. 463 (1938), upon which the Commission relied, was not a determinative precedent. While it is true that the complaint in the *Weyerhaeuser* case was dismissed on another ground, the public-private distinction was applied in that proceeding, the Commission finding that the complainant was a public terminal.

Although the court below announced that it made no "ruling on the legality of the discrimination" (R. 794-795), it did hold that "if the discrimination is to be justified * * * it must be on some basis other than the public-private distinction drawn by the Commission in Weyerhaeuser" (R. 794). In rejecting the *Weyerhaeuser* case as a precedent the court below commented that "the record does not support a finding that the Army Base piers were private as that term is normally used in this field" (R. 794). The court justified this conclusion by commenting that "the Government's shipment of freight over its own piers was not a mere matter of commercial convenience or advantage; it was

dictated by the fact that the other facilities owned by the carriers at the port of Norfolk could not have accommodated the vast volume of military traffic" (R. 794). The Government's reasons for using its own facilities are not controlling on the question whether those facilities are *public* or *private* in character. The fact remains that the Government itself chose to convert piers that had been public facilities into an Army base.

The most that can be said of the court's disposition of this matter is that it reached a different conclusion on the evidence from that of the Commission. Not only is there evidence of record both as to the Army's intention to operate the base "for its own exclusive use" and its actual practice in that respect, but it would seem difficult to conclude, in the absence of the clearest evidence, that the Army occupied the Army Base for the purpose of engaging in the business of a public wharfinger. In any event, determination of this question is peculiarly within the province of the Commission. In *Barringer & Co.* v. *United States*, 319 U. S. 1, 6, which dealt with the loading of cars under certain conditions and the refusal of the railroads to load under other conditions, this Court said that the weighing of circumstances and conditions as required by Section 2 "is a question of fact for the Commission's determination." In *United States* v. *Wabash R. Co.*, 321 U. S. 403, 411, 413, this Court said:

> "Differences in conditions may justify differences in carrier rates or service. In determining whether there is a prohibited unjust discrimina-

tion or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful. * * * In any case findings of discrimination or undue preference under §§ 2 and 3(1), as we have said, are for the Commission and not the courts."

CONCLUSION

The Commission has considered this proceeding three times upon a record consisting of more than 500 printed pages. It has made findings upon every point and issue and has discussed in its several reports the evidence upon which its findings rest. Furthermore, the Commission has unusual familiarity with the subject matter, as similar questions have been raised in numerous other proceedings. Obviously the Commission does not regard the record as inadequate, and, during the eight years since the complaint was filed, no party has suggested the contrary or requested an opportunity to present additional evidence. The opinion of the majority of the Court of Appeals rejects the findings of fact made by the Commission after a careful consideration of the evidence and in so doing the court also rejects or disregards principles consistently applied by the Commission for many years. In the circumstances the Commission believes that in the interests of orderly and prompt disposition of this litigation the decision of the court below should be reviewed by this Court at the present time.

For the reasons that have been stated it is respec
fully submitted that the petition for writ of certiora
should be granted.

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APPENDIX

Pertinent Provisions of Statutes.

INTERSTATE COMMERCE ACT, PART I, 24 Stat. 379, as amended, 49 U.S.C. § 1 et seq.

Sec. 1(5). All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 1(6). It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Sec. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of

unjust discrimination, which is prohibited and declared to be unlawful.

Sec. 6(8). In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

Sec. 8. In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 15(13). If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

Sec. 17(9). When an application for rehearing, reargument, or reconsideration of any decision, order or requirement of a division, and individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after

rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.